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IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATES OF INDIANA AND IOWA

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	1
Jurisdiction	2
Consent of Parties	2
Question Presented	2
Constitutional Provisions Involved	3
Interest of the Amici	4
Statement of the Case	5
Argument	6
Conclusion	18

TABLE OF AUTHORITIES

CASES

	Page
Aguilar v. Texas, 378 U. S. 108 (1964)	9, 15
Elkins v. United States 364 U. S. 206 (1960)	17
Johnson v. United States, 333 U. S. 10 (1948)	13
Malloy v. Hogan, 378 U. S. 1 (1964)	17
Mapp v. Ohio, 367 U. S. 643 (1961)	8
Michigan v. Tucker, 94 S. Ct. 2357 (1974)	15, 16
People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926)	17
Rice v. Wolff, (D. C. Neb., 1974) 388 F. Supp. 185	2
Rice v. Wolff, (8th Cir., 1975) 513 F. 2d 1280	2, 6
Spinelli v. United States, 393 U. S. 410 (1969)	9, 10
State v. Rice, 188 Neb. 728, 199 N. W. 2d 480 (1972)	2
Twining v. New Jersey, 211 U. S. 78 (1908)	17
United States v. Calandra, 94 S. Ct. 613 (1974)	8, 16
United States v. Harris, 403 U. S. 573 (1971)	16
United States v. Ventresca, 380 U. S. 102 (1965)	13
Weeks v. United States, 232 U. S. 383 (1914)	8

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

	Page
Fourteenth Amendment to the Constitution of the United States	4, 17
Fourth Amendment to the Constitution of the United States	3, 9, 12

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED—Continued

	Page
Ninth Amendment to the Constitution of the United States	3, 17
Tenth Amendment to the Constitution of the United States	3, 17
28 U.S.C. § 1254 (1)	2

OTHER AUTHORITIES

Rule 42 of the Rules of the Supreme Court of the United States	1, 2

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, and Donald P. Bogard, Assistant Attorney General, and the State of Iowa, by Richard C. Turner, Attorney General of Iowa, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, submit their *amicus curiae* brief on the merits in support of the Petitioner in the above-entitled cause.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (hereafter Eighth Circuit) is reported

as *Rice v. Wolff,* (8th Cir., 1975) 513 F.2d 1280, and may be found at pages 28 through 57 of the Appendix attached to the Petition for Writ of Certiorari (hereafter Cert. App.).

The opinions of the United States District Court for the District of Nebraska (hereafter District Court) are reported as *Rice v. Wolff,* (D.C. Neb., 1974) 388 F. Supp. 185, and may be found at Cert. App. 58 through 97.

The opinion of the Supreme Court of Nebraska is reported as *State v. Rice,* 188 Neb. 728, 199 N.W. 2d 480 (1972).

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said writ on June 30, 1975.

CONSENT OF PARTIES

The *amicus curiae* brief is filed by the States of Indiana and Iowa pursuant to Rule 42 of the Rules of this Court and consent of the parties is not required pursuant to Rule 42(4).

QUESTION PRESENTED

1. Whether, in a state court proceeding, the exclusionary rule should be modified to admit relevant,

competent evidence which was obtained pursuant to a search warrant and an arrest warrant later held invalid by a federal district court, and which was obtained under the most exigent circumstances and in the exercise of the utmost good faith by the law enforcement officers and the courts, when the imposition of that rule will provide no deterrent effect and can serve no valid purpose?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Ninth Amendment to the Constitution of the United States provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment to the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTEREST OF THE AMICI

The States of Indiana and Iowa submit this brief since the questions presented by the State of Nebraska are equally vital to Indiana, Iowa, and all other states in the Union. The decisions by the District Court and the Eighth Circuit confound and confuse the officials of the various states that are charged with administration and enforcement of the system of criminal justice in the states.

This case involves the exclusion of evidence in a federal habeas corpus proceeding that was obtained pursuant to a search warrant and an arrest warrant issued by a magistrate and found to be valid by the Supreme Court of Nebraska. Altogether, a total of nine (9) judges from the State of Nebraska examined and approved the issuance of the warrants in question. However, in a proceeding for post-conviction relief and an appeal therefrom, the federal judiciary concluded that the search warrant was not valid.

This type of action by the federal judiciary totally disrupts the valid state function of the administration of a system of criminal justice. Cases involving the exclusion of relevant evidence make up a large percentage of all criminal appeals in the State of Indiana, and the same

is undoubtedly true in all other states. Therefore, Indiana, Iowa, and all other states have a valid interest in having this Court modify the exclusionary rule to allow the admission of evidence in state court proceedings obtained under search warrants fully approved by judges of the state courts.

The administration of a system of criminal justice in a state is a right and a power reserved to the states by the Constitution, and further encroachment on that right and reserved power cannot be tolerated by the states if the Federal system is to be valid at all.

STATEMENT OF THE CASE

The *amici* accept and adopt the "Statement of the Case" contained in Petitioner's brief on the merits.

ARGUMENT

THE EXCLUSIONARY RULE SHOULD BE MODIFIED TO ADMIT RELEVANT, COMPETENT EVIDENCE OBTAINED PURSUANT TO SEARCH AND ARREST WARRANTS LATER HELD INVALID WHEN THE EVIDENCE WAS OBTAINED UNDER THE MOST EXIGENT CIRCUMSTANCE AND IN THE EXERCISE OF THE UTMOST GOOD FAITH, AND WHEN THE IMPOSITION OF THAT RULE WILL PROVIDE NO DETERRENT EFFECT AND CAN SERVE NO VALID PURPOSE.

This case is in this Court upon the granting of a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit from a case entitled *Rice v. Wolff*, (8th Cir., 1975) 513 F. 2d 1280. In the opinion issued in that cause, the Eighth Circuit stated at page 1289:

> "The decisions of the Supreme Court convincingly demonstrate, and we so hold, that the district court was left with no choice but to conclude that the affidavit of Sergeants Pfeffer and Swanson was insufficient to establish probable cause. Consequently, the district court was correct in holding that the search warrant was invalid."

The search warrant involved was secured by the Omaha Police Department following six (6) days of intensive investigation that had commenced after Omaha Police Officer Minard had been killed on August 17, 1970 by a bomb contained in a booby-trapped suitcase which was located in an empty house to which the Police had been

dispatched to investigate an anomymous report of a screaming woman.

Those six days of investigation had narrowed the suspects in the bombing to an organization entitled the National Committee to Combat Fascism (hereafter N.C.C.F.) and three of its officers and members, namely Edward Poindexter, Duane Peak and David Rice, the Respondent herein.

On the afternoon of August 22, 1970, arrest warrants were issued for Poindexter and Peak. A Police Task Force went to the N.C.C.F. headquarters and discovered a large amount of ammunition and firearms, and arrested a member of N.C.C.F. named Cecil.

Unable to locate Poindexter and Peak, the Task Force first went to Poindexter's house, then to Peak's, and still being unsuccessful, proceeded to Rice's house at 2816 Parker Street. By the time the Police arrived at Rice's house they had been advised by Donald Peak that his brother Duane had been involved in the bombing (Brief Appendix P. 64, hereafter App. p. —) and that Rice, Poindexter and Peak had been at Rice's house when they constructed the bomb (App. p. 74).

When the Police arrived at Rice's house, there were lights on and a television set was playing. After knocking and receiving no response, two members of the Task Force determined that they should attempt to secure a search warrant for the Rice house. The warrant was obtained in about an hour, and upon the officers return the search commenced with the officers discovering, in plain view, fourteen (14) sticks of dynamite, blasting caps, a six volt battery, wire, dykes, pliers, magnets, several weapons and some ammunition. (App. p. 12) The state district court and the Supreme Court of Nebraska both held the search warrant valid.

The District Court and the Eighth Circuit both held that there was not sufficient information presented to the issuing magistrate for him to have probable cause to issue the warrant, and therefore, the evidence discovered in plain view in the search conducted after receiving the warrant was excluded.

The Exclusionary Rule was first advanced by this Court in the case of *Weeks v. United States,* 232 U. S. 383 (1914), wherein this Court stated at page 393:

> "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises . . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution . . .

This judge-made rule for many years was applied only to federal proceedings, but was subsequently expanded to include states in *Mapp v. Ohio,* 367 U. S. 643 (1961).

In *United States v. Calandra, 94 S. Ct. 613, 619 (1974)* this Court stated:

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." Linkletter v. Walker, 381 U. S. 618, 637, 85 S. Ct. 1731, 1742, 14 L. Ed. 2d 601 (1965).

Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U. S. 206, 217, 80 S. Ct. 1437, 1444, 4 L. Ed. 2d 1669 (1960).

. . . In sum, the rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

"Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally-seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served . . ."

This Court went on to discuss various "balancing" requirements in invoking the exclusionary rule, concluding that suppression of illegally-seized evidence against the search victim is an important method of effectuating the Fourth Amendment, but that the Fourth Amendment does not require adoption of every proposal that might deter police misconduct.

In the case at bar, the District Court held that the search warrant did not meet the probable cause requirements established by this Court in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). In *Aguilar,* the Houston Police secured a search warrant upon an affidavit that stated:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." 378 U.S. at 109.

This Court held that that statement was not sufficient to show probable cause, and established a two-pronged test for affidavits based upon hearsay information: (1) that the magistrate "be informed of some of the underlying circumstances" to show the basis for the informant's conclusions, and (2) "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' 378 U.S. at 114.

That holding was significantly expanded by *Spinelli, supra,* wherein this Court stated at pages 415 and 416:

". . . We believe, however, that the "totality of circumstances" approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.

"The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it

establishes were designed to implement the long-standing principle that probable cause must be determined by a "neutral and detached magistrate," and not by "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar's* requirements when standing alone."

In so holding however, this Court stated at page 419:

". . . In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck v. Ohio,* 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois,* 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca,* 380 U. S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States,* 362 U. S. 257, 270-271 (1960). But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

A disinterested judicial officer interposed himself between the police and the citizens in this cause, and his decision was upheld by nine (9) state court judges. The *amici* would submit that the magistrate's finding of probable cause was the proper finding, and it should have been accepted by the Federal Courts.

The Fourth Amendment provides that ". . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In this case a warrant was issued supported by an affidavit, particularly describing the place to be searched and the things to be seized. The Fourth Amendment requires no more.

The affidavit submitted to the magistrate was as follows:

> "The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August, 1970, who, being first duly sworn, upon oath says:
>
> "That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.
>
> "That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816. In Omaha Douglas County, Nebraska.
>
> "That said property is under the control or custody of David Lewis RICE, Minister of Information, National Comittee [sic] to Combat Fascism.
>
> "That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Comittee [sic] to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occured [sic], in Omaha, and arrests were made from the membership of the NCCF. We have been told in the past that RICE keeps explosives, at his residence, and also

> illegal weapons, which he has said should be used against Police Officers.
>
> "A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed."

In reviewing affidavits to determine if there was probable cause to issue a search warrant, an appellate court must look at those affidavits as they were presented to the magistrate. In that regard, this Court's comments in *United States v. Ventresca,* 380 U.S. 102, 108 (1965) are significant:

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, *affidavits for search warrants,* such as the one involved here, *must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation.* Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." (Emphasis supplied.)

Even though magistrates are required to be "neutral and detached," as stated in *Johnson v. United States,* 333 U.S. 10, 14 (1948), they still must exercise their responsibility promptly when called upon to do so. They do not have the luxury afforded appellate courts in studying the affidavit, having written briefs submitted by all parties on the sufficiency or non-sufficiency of the affidavit, hear-

ing oral argument from the interested parties, and then reflecting upon the question for several months. Magistrates are confronted with an immediate situation requiring prompt action.

In the case at bar, there had already been one bombing resulting in the death of Officer Minard, and dynamite was suspected of being kept in the house of one of the N.C.C.F. members suspected in that bombing. After six days of intensive investigation, Police Officers, searching for Poindexter and Peak, went to the house of Rice upon the belief Peak was there. Seeing lights on, hearing the television, and getting no response to their knock, two of the officers determined to secure a search warrant. Note that the officers did not draw their service revolvers, kick the door down and go busting inside. The prior decisions of this Court *worked* on those officers, and they left for an hour to get the warrant.

Obviously those two officers were not possessed of all the information known by the Omaha Police Department regarding the bombing case. Nevertheless, they gave their affidavit to the magistrate who made a common sense, realistic interpretation thereof and concluded that probable cause was present.

The affidavit certainly could have been expanded if all of the Police Officers having information had gone to the magistrate and laid out their entire case. However, under the extremely exigent circumstances that existed in Omaha at that time, it was not reasonable or feasible for the Police Department to so act.

In reviewing the existence of probable cause, this Court stated in *Aguilar, supra,* at page 111:

> "... when a search is based upon a magistrate's, rather than a police officer's, determination of probable

> cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," *ibid.*, and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present...." *Id.*, at 271.

Last term, in *Michigan v. Tucker,* 94 S. Ct. 2357, 2365 (1974), Justice Rehnquist, speaking for the majority, said:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. *Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.*
>
> *We have recently said, in a search and seizure context, that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."* United States v. Calandra, — U.S. —, p. —, 94 S.Ct. 613, p. 619, 38 L.Ed.2d 561. We then continued:
>
> " 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217 [80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669] (1960)." United States v. Calandra, p. —, 94 S.Ct., at p. 620.
>
> ...
>
> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct, which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating

officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (Emphasis supplied)

Chief Justice Burger properly emphasized the inquiry regarding search warrants in *United States v. Harris,* 403 U.S. 573, 584 (1971), stating:

". . . the issue in warrant proceedings is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises. See *Brinegar v. United States, supra,* at 173. . . ."

In determining probable cause, the cases of *United States v. Calandra, supra,* and *Michigan v. Tucker, supra,* both show that a balancing of interests must be made, and that the Court:

". . . must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also "must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants." Jenkins v. Delaware, 395 U.S. 213, 221, 89 S.Ct. 1677, 1681, 23 L.Ed.2d 253 (1969). These interests may be outweighed by the need to provide an effective sanction to a constitutional right, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1941), but they must in any event be valued." 94 S.Ct. at 2367.

The exigent circumstances involved in this case are well detailed in the Petition for Writ of Certiorari, and it is undisputed that when the police searched Rice's home they discovered, in plain view, the very items described in the warrant in the exact location listed in the warrant. Those

items were highly dangerous devices used for making bombs, bombs similar to the one that had killed Officer Minard.

The *amici* would emphatically urge this Court to re-examine the exclusionary rule and to modify it to allow lawfully attained evidence such as that secured here to be admitted. The rule's purpose is to deter police "by removing the incentive to disregard it." *Elkins v. United States,* 364 U.S. 206, 217 (1960). This is not a case like *People v. Defore,* 242 N.Y. 13, 150 N.E. 585, 587 (1926) where Judge Cardozo made the oft-quoted statement that [t]he criminal is to go free because the constable has blundered." Here the Omaha Police did everything required of them, sought the necessary warrant, and ended up being punished for their efforts. A rule which does that and which allows freedom to radical elements who hide booby-trapped bombs to murder innocent, unsuspecting people, cannot have a valid place in the jurisprudence of the United States of America.

It may well be that this Court should reconsider its decisions which have merged the first eight amendments to the Constitution of the United States with the Fourteenth Amendment. In *Malloy v. Hogan,* 378 U.S. 1 (1964), this Court overruled *Twining v. New Jersey,* 211 U.S. 78 (1908), the well written decision that held the Fourteenth Amendment was not to be construed as applying those first eight amendments as constitutional limitations on state action.

Federal courts have steadily attempted to erode the power of states in recent years by compelling first one and then another of the first eight amendments on the states by virtue of the Fourteenth Amendment. In so doing, the courts have ignored the provisions of the Ninth and Tenth Amendments which reserve all rights and powers

not enumerated or delegated in the Constitution to the people and the states.

The case at bar is an excellent example of federal intrusion into an area of state responsibility whereby the federal courts overturned the valid decisions of nine state court judges, and excluded relevant, competent evidence from a state court trial.

The administration of criminal justice within a state is certainly one of the powers reserved to the states, and this Court should re-examine its decisions and allow the states to manage their own affairs.

CONCLUSION

For all the foregoing, the *amici* respectfully pray this Court reverse the decision of the Eighth Circuit and affirm the decision of the Supreme Court of Nebraska.

Respectively submitted

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